



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1135 OF 2001

ALICE NYAMWEYA & ANOTHER PLAINTIFF

VERSUS

PETER MBAU GAITHO DEFENDANT

RULING

This is an interesting application. The suit before me involved a running down cause whereby the plaintiff aged 32 years old in 1999 sustained personal injuries as a result of a road traffic accident whilst she was a passenger. There was a collision between two vehicles.

The suit was heard on the 25.2.03 and judgment was delivered on 26.2.03 infavour of the plaintiff.

When the plaintiff attempted to execute her decree the defendant changed advocates and filed the present application dated the 19.12.03 which is the subject matter of this ruling.

A) APPLICATION DATED 19.12.03

This application sort orders for stay of execution pending the determination of this application under order 21 r22 Civil Procedure Rules.

It also sort orders for setting aside this courts judgment under order 9b r 8 Civil Procedure Rules and seciton 3A and 63 (e) of the Civil Procedure Act.

What the applicant was saying was that he was unaware of this suit Hccc 1135/01. Alice Nyamweya v Peter Mbai Gaitho. That he in fact was never served with summons to enter appearance nor did he file his defence. He nonetheless admitted that there was an advocate on record, whereby a defence was filed on his behalf together with the Memorandum of Appearance. Before the application was heard his new advocate insisted the process server be summoned to court for purposes of being crossed examined on the issue of services.

ii) THE PROCESS SERVER

The advocate for the plaintiff/respondent tried to trace the process server. She made efforts including summons being issued by this court. The process server was not traced as he no longer resides in Nairobi.

The hearing of the application inter-parties proceeded. It was the contention of the new advocate for the defendant that the defendant was unaware of this suit. That as the hearing proceeded in his absence, he requests that the judgment entered against him be set aside under order 9br 8 CPR. That there be a stay of execution until this be done. The grounds for doing this is that there was no affidavit of service filed in the court file proving that the defendant had been served. The court has therefore discretion to set aside

the judgment and the orders should accordingly be granted under order 9b r 8 CPR.

In the case law of:-

Pithon Waweru Maina

V

Thuka Mugiria (1982-88) I KAR 171

Which the advocate relied on at page 177 and 178 Kneller JA (as he then was) stated:- “what is the law about this?” Order 9b is in these terms.:

“Where judgment has been entered under this order the court on application by summons, may set aside or vary such judgment and any consequential decree or order upon such terms as may be just.”

“The court has a very wide discretion under the order and rule and there are limits and restriction on the discretion of the judge except that if the judgment is varied it must be done on this that are just”.

“The discretion is intended to be exercised to avoid injustice or hardship resulting from the accident, in adventure or error but it is not designed to assist a person who deliberately sought, whether by evasion or otherwise to abstract the course of justice.”

The application was objected to by the respondent/plaintiff advocate who brought to my attention that the hearing had been conducted inter-parties

It is quite clear when summons to enter appearance is served on the defendant and the defendant enters appearance in person or through an advocate the practice in these courts is not to file an affidavit of service. The fact of an appearance being entered being proof of that service. It is only when there is no appearance that such affidavit is filed in order for the plaintiff to apply for an interlocutory judgment. Ideally an affidavit of service should be filed and this aspect in the reforms of our practice and procedure should be looked into.

Nonetheless, once an advocate is on record, as was in this case, he remains an agent of that party and takes all necessary action as required by law under order III Civil Procedure Rules. The advocate for the defendant appeared before the then principal deputy registrar C.K. Njai for pre-trial applications. The said advocate came to court for hearing on the 25.02.03. The advocate for the defendant stated he did not “have the defendant in court and thus [did] not dispute liability.”

There have been several decisions whereby it has been held in any suit where a defendant is absent but the advocate for the defendant present, the defendant is not considered to be absent.

This therefore means that it is not always necessary for the defendant to attend court if there is an advocates on record who appears. It is also noted that even if the defendant is present in court he need not give evidence or call any evidence in support of his case - if he so wishes.

I therefore have a situation before me where an advocates of the High Court appeared for trial on behalf of the defendant.

The defendant changes advocate under a certificate of urgency as provided by the law.

I note that the proper procedure for this is that the former advocate must attend court with the new proposed advocate at the hearing of such application so as to indicate whether or not he objects to the change of advocate. This rule was necessitated (ie order III r 9 (A) LN128/01) because often after a suit

has been finalized parties would come to court in person or change advocates to circumvent the execution or course of a case. It was trying to remedy the anomaly.

I am not aware that the former advocate was indeed served with the application of change of advocate as all this was done under a certificate of urgency. It is the former advocate who should have been called or notified to explain why he may have been on record without the defendants knowledge.

I note order III Civil Procedure Rules is very clear. Once an advocate is on record he acts through out the trial. The court requires no other proof that such an advocate was not authorized or otherwise if indeed there was no application to the contrary. The issue of summoning a process server does not therefore arise.

I now come to order 9b r 8 CPR.

b) Order 9b r 8 CPR.

This order applies where a hearing has proceeded ex-parte against the party or alternatively dismissed for non-attendance to court.

In this case, the hearing proceeded inter-parties. There was never an ex-parte hearing and thus the authority of:-

Pithon Waweru Maina V Thuka Mugiria (1982-88) I KAR 171 is not applicable.

A judgment heard inter parties cannot be set aside on the grounds that the defendant was absent.

I find that this application has no merits. The same is dismissed with costs to the respondents/plaintiff.

Dated this 23rd day of March 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Muriungi & Co. Advocates for the plaintiff

Opande & Co. Advocates for the defendant